Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1423

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY,

Appellant,

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal from the Court of Appeal, Second Appellate District, State of California.

JURISDICTIONAL STATEMENT

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March 12, 1980

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. ————

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY,

Appellant,

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal from the Court of Appeal, Second Appellate District, State of California.

JURISDICTIONAL STATEMENT

Appellant, The Western and Southern Life Insurance Company, appeals from the judgment of the Court of Appeal, Second Appellate District, State of California, reversing the decision of the Superior Court of Los Angeles County. Appellant's petition for hearing by the Supreme Court of California was denied December 27, 1979. Appellant hereby files the jurisdictional statement as required by Rule 13, paragraph 2, of the Rules of the Supreme Court of the United States.

OPINIONS BELOW

The minute order of the Superior Court's Intended Decision and Memorandum of Intended Decision, the Court's Conclusions of Law and its Judgment are set out in Appendix A, beginning at page 1a. The opinion of the Court of Appeal and the order of the Court of Appeal modifying its opinion and denying Appellant's Petition for Rehearing are set out in Appendix A, beginning at page 27a. The order of the Supreme Court of California is set out in Appendix A, page 36a. The original Court of Appeal opinion before its modification in response to Appellant's Petition for Rehearing appears at 159 Cal. Rptr. 539 (1979). The decision of the Supreme Court of California denying a hearing ("Hearing Denied") remains unpublished.

GROUNDS FOR JURISDICTION

This is an appeal from a judgment of the Court of Appeal, Second Appellate District, State of California, entered November 2, 1979. Petition for Rehearing by the Court of Appeal was filed by Appellant on November 19, 1979. In an order filed November 28, 1979, the Court of Appeal modified its opinion of November 2, 1979 and denied rehearing. On December 11, 1979, Appellant filed a petition for hearing of this cause by the Supreme Court of California, which denied the petition on December 27, 1979. Notice of Appeal to this Court was filed with the Court of Appeal, Second Appellate District, State of California, on February 11, 1980, a copy of which, duly stamped by such Court as filed on such date, is set out in Appendix B, beginning at page 37a. Notice of Appeal to this Court was also sent to the Supreme Court of California on February 5, 1980 and was returned by the Clerk of such Court with the advice that the record in this case

was in the possession of the Court of Appeal. A copy of such letter is set out in Appendix B, page 40a.

Appellant, an Ohio insurance company, asserts that the following described discriminatory actions of Appellee in fixing the tax liability of Appellant, a foreign insurance company, violate the Constitution of the United States.

1. The levying of retaliatory taxes upon Appellant for the years 1965 through 1971, under California Constitution, Article XIII, section 14-4/5 (f) (3), as amended November 3, 1964, (California Constitution, West Supp. 1964), California Insurance Code, section 685 (West 1972) and California Revenue and Taxation Code, section 12284 (West 1970); and

2. The denial of a credit against premium taxes for 1966 through 1971, under California Constitution, Article XIII, section 14-4/5 (e), (West Supp. 1966), California Revenue and Taxation Code, section 12241 (West 1970).

These constitutional and statutory provisions are lengthy, and the pertinent texts are set out in Appendix C, beginning at page 41a. Appellant paid the taxes under protest each year and made claims for refund thereof on the grounds of violation of the federal Constitution.[1] Appellee denied the claims, and Appellant brought suit for refund in the Superior Court of Los Angeles County under authority of California Revenue and Taxation Code, section 13103. (Appendix C, p. 46a).

Appellant alleged in its complaint and the trial court found that the California taxes unconstitutionally affected

[1] These claims were timely filed with Appellee, as required by California Revenue and Taxation Code, section 13102. See Appendix C, page 45a.

interstate commerce and discriminated against Appellant contrary to the guarantees of the Fourteenth Amendment to the United States Constitution. The Court of Appeal reversed the lower court, expressly holding that the California legislation did not violate the cited provisions of the United States Constitution. The Supreme Court of California denied Appellant's Petition for Hearing, and the Court of Appeal decision became final on December 27, 1979. Thus, the statutory provision conferring jurisdiction of this appeal upon this Court is 28 U.S.C. § 1257 (2).

Cases sustaining the jurisdiction of the Supreme Court herein are *WHYY, Inc.* v. *Glassboro,* 393 U.S. 117 (1968); *Reserve Life Insurance Company* v. *Bowers,* 380 U.S. 959 (1965); and *Wheeling Steel Corporation* v. *Glander,* 337 U.S. 562 (1949).

In the *Glassboro* case, this Court considered an appeal from a decision by the Supreme Court of New Jersey denying the appellant's claim that denial of an exemption from state property taxes because of its out-of-state incorporation denied it equal protection of the laws in violation of the Fourteenth Amendment. In the *Reserve Life Insurance* case, this Court considered an appeal from a decision by the Supreme Court of Ohio dismissing an appeal from a Court of Appeals decision which had held that an Ohio statute taxing foreign insurance companies doing business in Ohio on their personal property used in business while exempting domestic companies did not violate the Fourteenth Amendment. In the *Wheeling Steel* case, this Court considered appeals by foreign corporations from judgments by the Supreme Court of Ohio affirming assessments of ad valorem taxes on out-of-state receivables against a claim of Fourteenth Amendment violation. In all three cases, the decisions appealed from were reversed by this Court, and the state statutes held unconstitutional.

QUESTIONS PRESENTED

The questions presented by this appeal are:

1. Does a state statute which levies a tax on foreign insurance companies but not on domestic insurance companies impose an unconstitutionally discriminatory burden on interstate commerce or deny to foreign insurance companies due process of law and equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution?

2. Does a state statute which grants domestic insurance companies a tax credit while denying such a credit to foreign insurance companies impose an unconstitutionally discriminatory burden on interstate commerce or deny to foreign insurance companies due process of law and equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution?

From 1965 to 1971, the State Board of Equalization of the State of California assessed against Appellant "retaliatory taxes" under the authority of the California Constitution, the Insurance Code, and the Revenue and Taxation Code. This legislation imposes an additional tax on a foreign insurance company doing business in California when the state of incorporation of the foreign insurer imposes on California insurance companies doing business in the foreign state higher taxes than California imposes on insurance companies from that foreign state doing business in California. By definition, this tax is *never* imposed on an insurance company incorporated in California, and its imposition is not dependent upon unequal treatment of foreign and domestic insurers by the foreign state. Were it so dependent, the tax would be called an "anti-discrimination retaliatory tax" (Appendix A, p. 7a) because its objective would be to discourage other states from discriminating against California insurance companies

by taxing them at rates higher than their own domestic insurers.

The parties herein stipulated, however, that Ohio did not impose a higher tax burden on California (or other foreign) insurers than on its domestic insurers,[2] and the trial court so found.[3] Ohio taxes all insurance companies equally, but the tax burden on insurance companies, both domestic and foreign, is higher in Ohio than in California. Therefore, an Ohio insurance company doing business in California pays an additional penalty tax to the State of California. Since this tax is based on a comparison of a foreign state's tax burdens with California's tax burdens, it is known as a "comparative retaliatory tax." Appellant brings before this Court the question of its constitutionality.

To exacerbate Appellant's tax predicament, Appellant also was denied full credit against its premium taxes for real property taxes paid with respect to its principal office in California for 1966 and later years under authority of the California Constitution and the Revenue and Taxation Code. This legislation grants *only* to California insurance companies a credit against insurance premium taxes for the full amount of real property taxes levied on their principal offices in California. The credit for foreign insurance companies is limited to the proportion of such real property taxes equal to the portion of the principal office property occupied by the foreign insurance company. Appellant challenges as unconstitutional the granting of a greater

---

[2] ¶ 2 of the Stipulation of Facts filed in the lower court states:
. . . by the laws of the State of Ohio, taxes, fines, penalties, licenses, fees, deposits of money or securities or other obligations or prohibitions imposed upon life insurers of California analogous to plaintiff doing business in Ohio, or upon their agents therein, were not in excess of those imposed by the State of Ohio upon such insurers of Ohio or upon their agents therein.

[3] ¶ 7, Conclusions of Law, Appendix A, p. 21a.

credit to a domestic insurer than a similarly situated foreign insurer.

As a result of these two aspects of California's taxation of foreign insurance companies, Appellant was forced to pay $977,853.57 more in taxes for the years here in issue than a California insurer of the same size and asset mix and doing equivalent business would have paid.

STATEMENT OF THE CASE

Appellant commenced this action on May 17, 1971 by filing a complaint in the Superior Court of the State of California for the County of Los Angeles, seeking refund of retaliatory taxes paid under protest for the years 1965 through 1969, inclusive, and premium taxes paid under protest for the years 1966 through 1969, inclusive, claims for credit and refund of which previously had been denied by Appellee. Each claim was incorporated by reference in the complaint and was attached thereto, and an averment was made that each statement in the claim was true. Each claim concerning refund of retaliatory taxes alleged, *inter alia,* that the tax was erroneously and illegally computed, assessed and collected, and illegal in its entirety and specifically that its imposition violated the equal protection and due process provisions of Section I of the Fourteenth Amendment to the Constitution and the commerce clause of Article I, Section 8 of the Constitution. Each claim concerning refund of premium taxes alleged, *inter alia,* that the denial of the principal office deduction similarly violated the equal protection and due process provisions of Section I of the Fourteenth Amendment and the commerce clause of Article I, Section 8 of the Constitution. In its answer, filed June 4, 1971, Appellee acknowledged that the copies of the claims for refunds of taxes paid incorporated in Appellant's complaint were true copies of

such claims, but denied that Appellant was entitled to refunds.

By stipulation of the parties filed December 31, 1976, Appellant's complaint was amended to include a prayer for refund of taxes paid for the years 1970 and 1971, subsequent to the filing of the original complaint, and Appellee's answer was extended to cover such amended complaint. Also on December 31, 1976, the parties filed a Stipulation of Facts which was admitted into evidence by order of the trial court on June 10, 1977.

The Superior Court for the County of Los Angeles, trying the case without a jury on the Stipulation of Facts, and following oral argument of counsel addressed principally to the federal constitutional questions, found both the retaliatory tax and the denial of the principal office deduction violated Appellant's rights under the United States Constitution. The Superior Court said (Memorandum of Intended Decision, Appendix A):

> This California tax is plainly discriminatory against interstate commerce. . . . It provides a direct commercial advantage to domestic business at the expense of out-of-state business. (p. 11a).
>
> . . . It is also self evident that by the McCarran-Ferguson Act Congress could not effectively consent to state taxation which violates the due process clause of the United States Constitution. (p. 13a).
>
> . . . We find that the retaliatory tax herein is discriminatory in fact and violates both the due process and commerce clauses of the United States Constitution. (p. 16a).
>
> Thirty years ago in *Freeman* v. *Hewit* (1946) 329 U.S. 249 at 252 the United States Supreme Court said, with reference to the many opinions that are pertinent to this subject, "To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future." This court is

> encouraged by the readiness with which the United States Supreme Court has recently overturned some of the historically unsound and illogical precedents in the field of state taxation. Just this year *Spector Motor Service* v. *O'Connor,* (1951) 340 U.S. 602 was specifically and unanimously overruled by *Complete Auto Transit, Inc.* v. *Brady,* [430 U.S. 274 (1977)]. Just last year, in *Michelin* v. *Wages* (1976) 423 U.S. 276 the court unanimously overruled *Low* v. *Austin* (1872) 80 U.S. (13 Wall.) 29. Thus encouraged, and with the original purposes of the due process, equal protection and commerce clauses in mind, and following the more recent reasoning and analysis of these matters by our highest court, this court concludes that the denial by defendant to plaintiff of the principal office deduction is an unconstitutional discrimination, that the California constitutional provision and statute mandating such denial violates the United States Constitution and that, therefore, plaintiff is entitled to that credit for all tax years pertinent herein. (p. 17a).

In its conclusions of law (Appendix A, pp. 19a-24a), the trial court held:

> 2. The authority to regulate and tax the insurance industry given to the states by the McCarran-Ferguson Insurance Regulation Act, 59 Stat. 33, 15 U.S.C. §§ 1011-15, could not and did not eliminate the restraints on state action in the Constitution of the United States.
>
> . . .
>
> 8. Section 685 of the California Insurance Code and Article XIII Section 14-4/5 (f) (3) of the California Constitution impose a comparative retaliatory tax which neither prevents discrimination by other states nor insures even-handed treatment by those states of California insurers.
>
> 9. The California retaliatory tax as effective for the years 1965 and following discriminates against in-

surers from other states, including Ohio, thereby providing a direct commercial advantage to local business and discriminated against interstate commerce, and, therefore, violates both the due process and commerce clauses of the United States Constitution.

. . .

16. Discrimination in granting a credit for real estate taxes against the gross premiums tax is prohibited by the due process and equal protection clauses of the Fourteenth Amendment to, and by the commerce clause of Article I, Section 8, Clause 3, of the United States Constitution.

This decision was appealed to the Court of Appeal by the State Board of Equalization on December 21, 1977. In its November 2, 1979 decision the Court of Appeal stated (Appendix A, p. 28a):

> This case involves the constitutionality of two provisions of California law imposing taxes on foreign insurance companies. The trial court found in favor of the plaintiff insurance company, holding that one of these provisions (the so-called retaliatory tax) was unconstitutional.

The Court of Appeal then stated (Appendix A, p. 31a):

> For many years, under the compulsion of *Paul* v. *Virginia* (1868) 75 U.S. (8 Wall.) 168, which had held that the business of insurance was not "commerce" within the meaning of the Commerce Clause of the federal Constitution, the states had imposed a variety of retaliatory taxes. In 1944, in *United States* v. *South-Eastern Underwriters Assn.* (1944) 322 U.S. 533, the Supreme Court overruled *Paul* v. *Virginia* and held that the business of insurance was within the commerce clause. Shortly thereafter, Congress enacted the so-called McCarran Act (59 Stats. 33, 15 U.S.C. §§ 1011-1015). That statute provided that

"the business of insurance . . . shall be subject to the law of the several States which relate to the regulation or taxation of such business." In *Prudential Ins. Co.* v. *Benjamin* (1946) 328 U.S. 408, the Supreme Court construed that statute and concluded that Congress had "clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it. . . ." (328 U.S. at 431.) We conclude that that decision, and other cases following it,[3] compel us to reject plaintiff's contention that the statutes herein involved are unconstitutional as affecting interstate commerce.

---

[3] See for example: *Prudential Ins. Co.* v. *Hobbs* (1946) 328 U.S. 822.

Finally, the Court of Appeal states (Appendix A, p. 33a):

The equal protection contention has been fully considered and rejected by a previous decision in this state in *Atlantic Ins. Co.* v. *State Bd. of Equalization* (1967) 255 Cal. App. 2d 1. Although that case involved the pre-1964 changes in the California Constitution, the decision dealt with both of the requirements of the provision as it then stood. After deciding that the Texas laws therein involved did discriminate against California insurers, the court discussed the issue of equal protection as related to the (second) comparative requirement. Relying in part on *Franklin Life Ins. Co.* v. *State Bd. of Equalization* (1965) 63 Cal. 2d 222, it was held that the comparative retaliatory tax did not violate the equal protection clause. Whether or not the court in *Atlantic* properly relied on *Franklin*, the decision was a square holding as to the equal protection issue, and not dictum, since, as we have said above, the pre-1964 California law required that both elements of the then constitutional provision be met before a retaliatory tax could be

assessed. The Supreme Court (of California) denied hearing in *Atlantic*. Right or wrong, we feel impelled to follow it in the case before us. It follows that, like the commerce clause contention, the equal protection contention must also fail.

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal raises substantial questions with respect to two constitutional provisions, the interstate commerce clause of Article I, Section 8 and the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. The rationale of the two lower courts in each instance constituted an interpretation of the applicability of the federal Constitution to the California laws here attacked by Appellant. Does a California statute imposing a higher franchise tax (in the form of a retaliatory tax) on a foreign (Ohio) insurance company doing business in California than on a domestic insurance company, solely because Ohio's non-discriminatory taxes on insurance companies are higher than California's, impose a prohibited burden on interstate commerce or deny equal protection of the laws and due process of law? Does a California law denying to a foreign insurance company the same credit against the premium tax granted domestic companies for property taxes on their principal offices in California violate the same constitutional inhibitions? The answers to these two questions rest purely on the proper interpretation of the language of the United States Constitution.

The questions raised are substantial in the context of constitutional law, as evidenced by the erudite discussion of the trial court finding the laws unconstitutional and the discussion of the Court of Appeal reversing. They are substantial in relation to the scores of other foreign insur-

ance companies doing business in California who have been subjected to the same discrimination; and they are substantial in relation to the laws of many other states imposing comparative retaliatory taxes on foreign insurance companies in the same manner as California.[4]

Contrary to the decision of the Superior Court of Los Angeles County, the Court of Appeal felt that the issue of the burden on interstate commerce imposed by a comparative retaliatory tax had been decided by this Court in *Prudential Ins. Co.* v. *Benjamin,* 328 U.S. 408 (1946) and *Prudential Ins. Co.* v. *Hobbs,* 328 U.S. 822 (1946), and that the issue of equal protection of the laws had earlier been determined properly in favor of the taxing statute in the California Court of Appeal decision of *Atlantic Ins. Co.* v. *State Bd. of Equalization,* 62 Cal. Rptr. 784, 255 Cal. App. 2d 1 (1st Dist. 1967), *cert. denied,* 390 U.S. 529 (1968). The Court of Appeal erred on both counts. The *Benjamin* case, decided by this court in 1946, did not involve a retaliatory tax such as is in issue here; it involved a pure premium tax of 3% levied by South Carolina on foreign insurance companies as a condition to doing business in the state. The *Hobbs* case, which was a per curiam decision of this Court in 1946, a week after the *Benjamin* decision, involved not a *comparative* retaliatory tax but an *anti-discrimination* retaliatory tax and one which the Supreme Court of Kansas had found not to discriminate against foreign insurance companies. *In Re Insurance Tax*

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[4] At least 46 other states have retaliatory tax laws applicable to foreign insurance companies, and many of them are of the comparative type. (Pelletier, *Insurance Retaliatory Law,* 39 NOTRE DAME LAWYER 243 (1964)). These laws have a checkered past; 13 were repealed and 24 challenged by suit as unconstitutionally affecting interstate commerce after the *South-Eastern Underwriters* decision, *supra.* After passage of the McCarran-Ferguson Act and the *Benjamin* decision, most states reenacted their retaliatory statutes, and the challenges by suit were discontinued.

Cases, 161 P.2d 726, 734 (1945). The *Atlantic* case similarly involved the California anti-discrimination retaliatory tax in effect prior to the 1964 constitutional amendment, not a comparative retaliatory tax.

The Superior Court of Los Angeles County correctly stated (Memorandum of Intended Decision, Appendix A, p. 12a):

> Shorn of its dicta, the *Benjamin* case upheld a tax which the record therein failed to establish was discriminatory (328 U.S. at 428, fn. 36). It was not even a retaliatory tax. . . .

and with respect to *Hobbs* (Memorandum of Intended Decision, Appendix A, p. 13a):

> . . . This involved several Kansas taxes including a so-called "retaliatory tax" on out-of-state insurers similar in form, but not in effect, to that herein. The Kansas court rejected the contention that the tax discriminated against out-of-state insurers. To quote it:
>
> > Plaintiffs contend the tax in question is void because of discrimination between foreign and domestic insurance companies. It is true that domestic insurance companies are taxed on a different basis. They are not required to pay a tax measured by their premiums, but they are required to pay a capital stock tax . . . . and a tax upon the net assets . . .
> >
> > The fact that the tax on domestic companies is upon a different basis than that upon foreign companies does not of itself render the tax invalid. . . . We are unable to find in the record evidence to support the view that the tax in question upon foreign insurance companies is greater than that levied on the home insurance companies. [161 P.2d at 734].

And finally, with respect to the *Atlantic Insurance Co.*

case, (Memorandum of Intended Decision, Appendix A, p. 15a):

> . . . It involved 1959 and 1960 taxes when the law was the same as that governing the *Franklin Life* case and the same result was reached. At page 5 the opinion acknowledges that "the new statute would be unconstitutional if applied to a case where the discrimination . . . is not present". *See also* page 15.
>
> When the express reason for sustaining the constitutionality of California's retaliatory tax has been repealed and its effect is discriminatory, the resulting law is so different that these opinions do not support it. . . .

The Superior Court of Los Angeles County discussed the two types of retaliatory taxes — the anti-discrimination tax and the comparative tax (Memorandum of Intended Decision, Appendix A, p. 7a) — and pointed out:

> . . . that the objective described above of discouraging other states from imposing discriminatory taxes on California insurers is effectively served by the anti-discrimination retaliatory tax and is not served at all by the "comparative retaliatory tax." The tax involved herein is of the latter type. A "comparative retaliatory tax" is not really retaliatory at all. It does nothing to prevent discrimination by other states. It does not insure even-handed treatment by those states of California insurers. If anything, it would seem to stimulate counter discrimination against California carriers.

This Court has not spoken on the matter of retaliatory taxes on insurance companies since *Benjamin, supra,* and *Hobbs, supra,* in 1946, and it has never considered the validity of comparative retaliatory taxes. Furthermore, since the discussion by this Court in the *Benjamin* case of the McCarran-Ferguson Insurance Regulation Act (15

U.S.C. §§ 1011-1015 (1970)), this Court has successively narrowed the interpretation of the words "business of insurance" in sections 1 and 2 of that Act to enlarge the area of insurance company activity subject to federal regulation. See *SEC* v. *Variable Annuity Life Insurance Company,* 359 U.S. 65 (1959), holding that the sale of variable annuities was not the business of insurance; *SEC* v. *National Securities, Inc.,* 393 U.S. 453 (1969) in which this Court defined the "business of insurance" as the relationship between the insurer and the insured, the interpretation and enforcement of insurance policies and other activities relating to the companies' reliability as insurers; and *Group Life & Health Insurance Company* v. *Royal Drug Company,* 439 U.S. 813 (1979), in which this Court held that agreements between Blue Shield, a Texas insurance company, and participating pharmacies regulating the cost of prescription drugs to Blue Shield policyholders were not the "business of insurance" exempt from anti-trust statutes under Section 2 (b) of the McCarran Act. See also *Federal Regulation of Insurance Companies: The Disappearing McCarran Act Exemption,* 1973 DUKE LAW JOURNAL 1340.

Perhaps more pertinent, the more recent decisions by this Court in the field of state regulation of interstate businesses, including insurance companies, indicate a recognition of the applicability of other constitutional provisions to state taxation of foreign insurance companies.

These cases include *Wheeling Steel* v. *Glander, supra; Reserve Life Ins. Co.* v. *Bowers, supra,* and *WHYY, Inc.* v. *Glassboro, supra.* The *Reserve Life Ins. Co.* case directly supports Appellant's position. The insurance company alleged that the Ohio personal property tax law was invalid under the equal protection clause of the Fourteenth Amendment when it was levied on foreign insurance companies while domestic companies were ex-

empted from the tax by a provision that their franchise taxes were in lieu of all other taxes. This Court reversed the decision of the Ohio Supreme Court affirming the Court of Appeals decision that the law was valid. It is clear that for equal protection standards a classification of corporations based solely on domestic or foreign incorporation is improper.

CONCLUSION

Appellant submits that the constitutional questions involved in this case are so substantial as to warrant plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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March 12, 1980

APPENDIX A

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

Honorable A. R. Early, Judge
Thomas Pulce, Deputy Sheriff
M. E. Stipe, Deputy Clerk
Reporter, (None)

C-3189

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY, a corporation

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA

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Appendix A

Nature of Proceedings: Court's Intended Decision

In the above-entitled matter now submitted, judgment is for plaintiff for the full amount of tax refunds sought in accordance with the enclosed Memorandum Decision plus interest.

To dispose of all issues and avoid a possible retrial following appeal the court further finds as follows:

A. Plaintiff is barred from claiming that it should be treated herein as a California insurer because it failed to so claim in its claim for refund. R. & T. Code Section 13103. Cf. *American Chemical Corp.* vs. *County of Los Angeles* (1974) 42 C.A.3d 45 at 55-56, hearing denied, cert. den. 422 U.S. 1007.

B. To the extent that plaintiff's principal office deduction is allowed to plaintiff, its retaliatory tax will be correspondingly increased. The premium tax and the retaliatory tax are mutually interdependent.

C. The 1966 Amendment to California Constitution, Article XIII, Section 14-4/5 (e) and R. & T. Code Sec. 12441 were not intended by the law-makers to be retroactive and can not be applied to 1966 taxes. Cf. *Western & Southern Life Ins. Co.* vs. *State Board of Equalization* (1970) 4 C.A.3d 21, hearing denied, at 34-35.

The stipulation of facts on file herein is adopted as the court's findings of fact. Plaintiff is ordered to prepare appropriate conclusions of law and judgment, submit them to defendant for approval as to form and accuracy and then to the court for signature.

A copy of this minute order and a copy of the Memorandum Decision are mailed to all parties. A Certificate of Mailing is filed. MINUTES ENTERED Aug. 4, 1977

Appendix A

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Original Filed
August 4, 1977
County Clerk

NO. C 3189

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY, a corporation,

Plaintiff,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Defendant.

MEMORANDUM OF INTENDED DECISION

This case involves the constitutionality of taxes paid under written protest by plaintiff for the years 1965-71 inclusive pursuant to Insurance Code Section 685 and Article XIII, Section 14-4/5 (f) (3) of the California Constitution as that section was amended November 3, 1964, effective 1965 (now renumbered as Article XIII, Section 28). It also involves the constitutionality of a portion of the premiums taxes paid under written protest by plaintiff

for the years 1966 through 1971 inclusive pursuant to Article XIII, Section 14-4/5 (e), as amended in 1966 so as to discriminate in favor of a "domestic insurer" as defined therein and against insurers incorporated outside of California in the credit allowed against the premiums tax known as the home office deduction.

The facts herein are stipulated. They are accurately condensed at pages 1 to 5 of plaintiff's opening brief (see defendant's trial brief at page 6, lines 5-7).

The tax imposed by Insurance Code Section 685 is referred to herein by both sides and in the Code as a "retaliatory tax," a confusing term because there are two different types of retaliatory tax. One type has been uniformly upheld by the appellate courts. This is a case of first impression dealing with the second type.

The plaintiff is an insurance carrier incorporated and having its principal office in Ohio. It has a Certificate of Authority for an indefinite term to do business in California issued pursuant to Insurance Code Section 701 which was effective July 1, 1956. Since that date, it has continually done business in this state. Prior to 1965, it constructed an office building on land it owns in this county, established its principal California office therein, and has so occupied it during all years pertinent herein.

RETALIATORY TAX

Let us first examine the issue of the so-called "retaliatory tax." Following the Civil War, the insurance business expanded greatly and there were tremendous abuses. Regulation was needed, but there was no federal legislation to restrain the business. When state regulation was at-

tempted, it was attacked as a violation of the Commerce Clause of the U. S. Constitution. In *Paul* v. *Virginia,* 8 Wall. 168 (U.S. 1868), the United States Supreme Court permitted such state regulation to continue by holding that the insurance business was not commerce at all. *Accord*: *Hooper* v. *California* (1895) 155 U.S. 648, 655, and *New York Life Insurance Co.* v. *Deer Lodge County* (1913) 231 U.S. 495. A great number and variety of state taxes and regulations then developed, some of which strongly discriminated taxwise in favor of locally incorporated insurers as against those incorporated in other states but also doing business locally. As an antidote to such tax discrimination by other states against local insurers when doing business in those other states, local legislatures often adopted a "retaliatory tax" against out-of-state insurers when doing business locally. Writing under the direction of Prof. Robert E. Keeton in 39 Notre Dame Lawyer 243 (1964), George Pelletier, Jr., states that such statutes had then been adopted in 45 states, noting that they vary considerably in detail.

The purpose of such a retaliatory tax, according to defendant, "is to secure for the insurance companies of the enacting state even-handed treatment by the other states" (DTB 11, lines 11-14). This is a quotation from *Western & Southern Life Insurance Co.* v. *State Board of Equalization* (1970) 4 Cal. App. 3d 21, at 34. In *Atlantic Insurance Co.* v. *State Board of Equalization* (1967) 255 Cal. App. 2d 1 (hear. den.) cert. den. 390 U.S. 529, at page 4, the opinion states that "The common purpose of such legislation in the several states has been to discourage any state from imposing discriminatory taxes or other burdens upon out-of-state companies." And at page 15, the opinion says that "here the purpose of the retaliatory law is to secure

reciprocity (citations omitted) . . . . It is designed to achieve uniformity and not to discriminate."

The opinion in *In re Insurance Tax Cases* (1945) 160 Kan. 300, 161 Pac. 2d 726, affirmed (per curiam) in *Prudential Insurance Co. of America* v. *Hobbs* (1946) 328 U.S. 822, expressed the object of a retaliatory tax in similar terms: "It seems to us more justly to be deemed a provision for reciprocity. It says, in effect, that while we recommend all insurance corporations of other states to the transacion of business within our limits, we insist upon a like recommendation elsewhere, and that if other states shall attempt, directly or indirectly, to debar our corporations from the transaction of insurance business within their borders we shall meet their corporations with the same restrictions and disability. It is, in brief, an appeal for comity; a demand for equality" (161 Pac. 2d 730). Are these objectives served by the type of retaliatory tax before the court herein? We think not. Let us examine that tax.

That there are two different types of retaliatory tax was expressly recognized by the opinion in the *Atlantic Insurance Company* case, *supra,* at page 5. That opinion contrasted the retaliatory tax authorized by Article XIII Section 14-4/5 (f) (3) of the California Constitution as it read *before* it was amended November 3, 1964 with the different type of retaliatory tax authorized by Insurance Code Section 685. The Constitutional provision (now changed) then authorized tax retaliation against insurers from another state only when the tax laws of that state discriminated against California insurers in favor of its domestic insurers, thus giving its domestic insurers a competitive advantage over California insurers within its borders. Unless the context indicates otherwise, as used hereinafter the word "taxes" includes taxes, licenses, fees, and

other financial exactions in the aggregate. Section 685 on the other hand imposed a "retaliatory tax upon foreign insurance companies whose home states levied higher taxes upon California companies than California imposed upon companies from those foreign states" (irrespective of whether the foreign state discriminated against California companies or taxed them exactly the same as it did its domestic companies). The first type of tax is identified in the opinion as a "discriminatory tax," whereas the second is described as a "comparative retaliatory tax" (255 Cal. App. 2d 5). A term more descriptive of the first type, which I will hereinafter use, would be an "anti-discrimination retaliatory tax." It is obvious that the objective described above of discouraging other states from imposing discriminatory taxes on California insurers is effectively served by the anti-discrimination retaliatory tax and is not served at all by the "comparative retaliatory tax." The tax involved herein is of the latter type. A "comparative retaliatory tax" is not really retaliatory at all. It does nothing to prevent discrimination by other states. It does not insure even-handed treatment by those states of California insurers. If anything, it would seem to stimulate counter discrimination against California carriers.

In 1944 the U. S. Supreme Court overturned its 1868 decision in *Paul* v. *Virginia, supra,* and in *United States* v. *South-Eastern Underwriters Association* (1944) 322 U.S. 533 it was held that insurance was commerce after all, and could be interstate commerce. Congress, however, did not then undertake to exercise its power under the Commerce Clause to regulate the interstate insurance business. Instead, it enacted the McCarran-Ferguson Act (59 Stat. 33; 15 U.S.C. Sections 1011-1015) which returned authority to regulate and tax the insurance industry to the states. As

the Act did not purport to repeal any part of the United States Constitution, the authority of the states is, of course, limited by that Constitution's constraints. Just what limits does the federal Constitution place upon the power of the states to tax interstate commerce? One percipient scholar and legal satirist, the late Professor T. Reed Powell, once said that if the American Law Institute were to restate the law of state taxation of interstate commerce, it would read as follows:

> **State Power to Tax Interstate Commerce**
>
> The states may tax interstate commerce.
>
> Comment: The states may not tax interstate commerce too much.
>
> Caveat: How much is too much is beyond the scope of this restatement.

Professor Powell was echoing the laments of members of the Court itself epitomized in the opinion in *Portland Cement Co.* v. *Minnesota* (1959) 358 U.S. 450, at 457-458:

> "Commerce between the States having grown up like Topsey, the Congress meanwhile not having undertaken to regulate taxation of it, and the States having understandably persisted in their efforts to get some return for the substantial benefits they have afforded it, there is little wonder that there has been no end of cases testing out state tax levies. The resulting judicial application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation. This Court alone has handed down some three hundred full-dress opinions spread through slightly more than that number of our reports. As

> was said in *Miller Bros. Co.* v. *Maryland,* 347 US 340, 344, 98 L ed 744, 748, 74 S Ct 535 (1954), the decisions have been 'not always clear . . . consistent or reconcilable. A few have been specifically overruled, while others no longer fully represent the present state of the law.' From the quagmire there emerge, however, some firm peaks of decision which remain unquestioned."

In *Prudential Ins. Co.* v. *Benjamin* (1946) 328 U.S. 408, 420, the opinion summarizes the situation as "one of very considerable judicial oscillation." However, even in that era of uncertainty, as stated in *Portland Cement, supra,* there were "some firm peaks of decision which remain unquestioned." Significant herein among those landmarks is the principle that "no State may impose a tax which discriminates against interstate commerce . . . . by providing a direct commercial advantage to local business" (citing cases) (358 U.S. at 458). *Accord: Richfield Oil Corp.* v. *State Board of Equalization* (1946) 329 U.S. 69, at 76, and *Hanover Fire Insurance Co.* v. *Harding* (1926) 272 U.S. 494. This language was quoted approvingly by a unanimous court in *Boston Stock Exchange* v. *State Tax Commission* (1977) 50 L.ed. 2d 514 at 524. The reason behind the rule was simply stated:

> ". . . the very purpose of the Commerce Clause was to create an area of free trade among the several states. . . . The prohibition against discriminatory treatment of interstate commerce follows inexorably from the basic purpose of the Clause. Permitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses would invite a multiplication of preferential trade areas destructive of the free trade which the Clause protects."

Cases to this effect are legion. Even Alexander Hamil-

ton wrote, "An unrestrained intercourse between the States themselves will advance the trade of each, by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but their exportation to foreign markets." THE FEDERALIST No. 11, at 52 (Cooke ed. 1961).

Another recognized landmark is the principle that a state may tax interstate commerce so that it will carry "its fair share of the costs of state government in return for the benefits" and services it derives from the state. *Richfield Oil Corporation* v. *State Board of Equalization, supra,* 329 U.S. at 75. *Portland Cement Co.* v. *Minnesota, supra,* 358 U.S. at 462. *Complete Auto Transit, Inc.* v. *Brady* (1977) 51 L.ed. 2d 326 at 336.

In other words, "Interstate commerce may be made to pay its way."

The retaliatory taxes herein were levied pursuant to Insurance Code Section 685 and California Constitution Art. XIII, Section 14-4/5 (f) (3) as amended November 3, 1964, upon plaintiff, an insurance carrier incorporated in Ohio. During none of the years pertinent herein did Ohio discriminate against California carriers doing business in Ohio; Ohio imposed the same burdens and taxes on its domestic insurers that it did on California carriers doing business in Ohio. Ohio apparently had a retaliatory tax similar to California's which never became applicable herein because the taxes and burdens Ohio imposed on companies doing business in Ohio were greater than those imposed by California on its domestic insurers.

During this period, the California retaliatory tax was of the type described in the *Atlantic Ins. Co.* case, *supra,* at page 5 as a "comparative retaliatory tax." California im-

posed its premiums tax upon plaintiff each year and in addition thereto imposed a "retaliatory tax" which represented the difference between the California premiums tax paid by plaintiff and the aggregate taxes that a California company would have had to pay in Ohio upon the same volume of business done therein. The California premiums tax is an "in lieu" tax and, except for real property taxes (which are also paid by foreign carriers), *no other taxes were imposed by California on its own domestic carriers.* Recognition of this fact is essential to the finding that the California retaliatory tax discriminates against the plaintiff herein. As amended on November 3, 1964, the California Constitution no longer requires that Ohio discriminate against California insurers doing business in Ohio before California's "retaliatory tax" becomes applicable. This California tax is plainly discriminatory against interstate commerce. No reasonable ground for this discriminatory classification has ever been suggested. The tax has no relationship whatsoever to the benefits or services that the state furnishes a foreign carrier. It is a burden on interstate commerce which directly affects it by making it more costly relative to similar intrastate commerce which does not bear this burden. Tax discrimination is equally onerous whether cast in the form of a license tax, a property tax, a premium tax, an income tax, or a franchise tax. It provides a direct commercial advantage to domestic businesses at the expense of out-of-state businesses.

No California court has ever squarely upheld such a discriminatory tax. No federal court has ever upheld a "comparative retaliatory tax" where it was proved that the effect of that tax was discriminatory.

Defendant argues that California has the power to impose a discriminatory tax upon foreign corporations as a

condition of their right to continue to do business in California. Let us examine some of these cases upon which defendant relies.

Prudential Ins. Co. v. *Benjamin* (1946) 328 U.S. 408 upheld a premiums tax imposed by South Carolina on out-of-state insurers but not imposed on domestic insurers. Viewed in isolation, this appears to be discriminatory. However, South Carolina denied discrimination (at 411, 412) and the opinion recites that the record did not establish that the tax was discriminatory in effect when the other taxes paid by domestic carriers but not paid by out-of-state carriers were considered (fn. 36, 3rd paragraph). The Court, however, "assumed" that the tax would be discriminatory in certain other senses (at 428, fn 36 and fn 4). It nevertheless upheld the tax on the ground the Congress had consented thereto in the McCarran-Ferguson Act, simultaneously acknowledging that Congress had no power "to subvert constitutional limitations" (at 430).

The tax upheld was not a so-called "retaliatory tax" of either type. The opinion expressly disclaimed approval of such a tax. In fn 40, it referred to allegedly similar tax statutes of sixteen other states and said that "We express no opinion concerning the validity of any feature of these statutes not substantially identical with those of the South Carolina tax dealt with herein." A retaliatory tax hardly qualifies as "substantially identical."

Shorn of its dicta, the *Benjamin* case upheld a tax which the record therein failed to establish was discriminatory (328 U.S. at 428, fn. 36). It was not even a retaliatory tax. This undermines the conclusion (perhaps an inadvertence) expressed in the opinion in *Franklin Life Ins. Co.* v. *State Board of Equalization* (1965) 63 Cal. 2d 222 in fn.

2. It is also self evident that by the McCarran-Ferguson Act, Congress could not effectively consent to state taxation which violates the due process clause of the United States Constitution. Even the *Franklin Life* opinion acknowledges (63 Cal. 2d at 226) that "Of course, any attempt to assess a retaliatory tax against an insurer from a state which does not discriminate against California insurers, would constitutionally fail." Amen! This statement is echoed at page 5 of the opinion in *Atlantic Ins. Co.* v. *State Board of Equalization* (1967) 255 Cal. App. 2d 1 (hear. den.), cert. den. 390 U.S. 529.

Defendant relies on *In Re Insurance Tax Cases* (1945) 160 Kan. 300, 161 Pac. 2d 726 which was affirmed (per curiam) shortly after the *Benjamin* decision sub. nom. *Prudential Ins. Co.* v. *Hobbs* (1946) 328 U.S. 822. This involved several Kansas taxes including a so-called "retaliatory tax" on out-of-state insurers similar in form, but not in effect, to that herein. The Kansas court rejected the contention that the tax discriminated against out-of-state insurers. To quote it:

> "Plaintiffs contend the tax in question is void because of discrimination between foreign and domestic insurance companies. It is true that domestic insurance companies are taxed on a different basis. They are not required to pay a tax measured by their premiums, but they are required to pay a capital stock tax . . . . and a tax upon the net value of their assets . . . The fact that the tax on domestic companies is upon a different basis than that upon foreign companies does not of itself render the tax invalid . . . . We are unable to find in the record evidence to support the view that the tax in question upon foreign insurance companies is greater than that levied on the home insurance companies." (166 Pac. 2d at 734).

The approach taken by the Kansas court has recently

been approved. Referring with approval to earlier opinions cited in fn. 8, in *Complete Auto Transit, Inc.* v. *Brady* (1977) 51 L.ed. 2d 326, the unanimous opinion notes that "these decisions have considered not the formal language of the tax statute, but rather its practical effect . . . ." (at 331). At the same page, the opinion notes that the permissibility of state taxation is "based on the actual effect rather than its legal terminology." Even the *Benjamin* opinion at page 420 states that in resolving these problems there should be "emphasis on facts rather than dogmatic logistic." Or, as Chief Justice Taft put it at page 510 of the opinion in *Hanover Fire Ins. Co.* v. *Harding* (1926) 272 U.S. 494, ". . . the decision is not dependent upon the form in which the taxing scheme is cast . . . . We must regard the circumstances rather than the form."

Approval by the United States Supreme Court of nondiscriminatory taxes in the *Benjamin* and *Hobbs* cases gives little support to defendant's contentions.

We have already mentioned the *Franklin Life Ins. Co.* case, *supra*. That opinion dealt with 1960 retaliatory taxes. At that time, the California Constitution, Art. XIII, Section 14-4/5 (f) permitted such taxes only against "foreign insurers of states discriminating against California insurers" (63 Cal. 2d 222 at 226; also see 233). It does not support such a tax against insurers from states like Ohio which do not discriminate against California insurers. To the contrary, at page 226 the opinion states that ". . . any attempt to assess a retaliatory tax against an insurer from a state which did not discriminate against California insurers would constitutionally fail."

Atlantic Insurance Co. v. *State Board of Equalization* (1967) 255 Cal. App. 2d 1 (hear. den.) cert. den., is also

relied upon by defendant. It involved 1959 and 1960 taxes when the law was the same as that governing the *Franklin Life* case and the same result was reached. At page 5 the opinion acknowledges that "the new statute would be unconstitutional if applied to a case where the discrimination . . . is not present." *See* also page 15.

When the express reason for sustaining the constitutionality of California's retaliatory tax has been repealed and its effect is discriminatory, the resulting law is so different that these opinions do not support it. *Western & Southern Life Insurance Co.* v. *State Board of Equalization* (1970) 4 Cal. App. 3d 21 (hear. den.) involved 1964 retaliatory taxes. Before 1964, the California Constitution had imposed a premiums tax on foreign and domestic insurers alike. When the tax laws of another state discriminated against California insurers in favor of its domestic insurers, California also imposed retaliatory taxes on insurers from that state doing business in California. Effective November 4, 1964, the California Constitution was amended to eliminate the discrimination requirement and thereafter imposed the tax on a foreign insurer when its state of incorporation taxed California insurers more than California would have done – even in the absence of any discrimination by that state. The opinion held that the amendment could not be applied retrospectively and therefore could not be considered in determining 1964 taxes. Dicta in the opinion (at page 30) states that "The California retaliatory tax law does not violate . . . the United States Constitution." The opinion fails to distinguish between the pre-1964 anti-discrimination retaliatory tax and the post-1964 comparative retaliatory tax. It fails to note that the cases cited have upheld taxes only when no discriminatory effect was proved. It also cites the *Atlantic*

Insurance Co. case, altogether ignoring the statement therein that "the new statute would be unconstitutional if applied to a case where the discrimination . . . is not present" (255 Cal. App. 2d 1 at 5).

We are persuaded that the more authoritative and convincing dicta is that noted above from *Franklin Life Insurance Co.* v. *State Board of Equalization* (1965) 63 Cal. 2d 222 at 226. We find that the retaliatory tax herein is discriminatory in fact and violates both the due process and commerce clauses of the United States Constitution.

Principal Office Deduction from the Gross Premiums Tax

The second tax involved herein is the gross premiums tax levied pursuant to former California Constitution, Art. XIII Section 14-4/5 (f) (3) which was imposed upon all insurers, out-of-state and domestic, in lieu of all other taxes and licenses except real estate taxes. Plaintiff does not challenge the basic tax. It challenges the denial (pursuant to the 1966 amendment) to it as an out-of-state insurer of the credit against that tax for the payment of local real property taxes, which credit is granted to domestic insurers.

That this principal office deduction was altogether repealed in 1976 is irrelevant herein.

Denial of this credit to plaintiff solely because it is an out-of-state insurer obviously creates a "direct commercial advantage to local business." It is a backhanded way of granting a property tax exemption to domestic insurers while denying it to out-of-state insurers. It invokes the rule that where a taxpayer's federal constitutional rights are concerned, the courts will not be governed by the label that a state attaches to a taxing device (here a privilege

tax) but by the practical consequences of the tax measured against constitutional standards.

Obviously such a discriminatory credit for other taxes paid could not stand constitutional testing if applied to an income tax, or to a gross receipts tax. Nor is discriminatory property taxation permitted.

Defendant seeks to sustain this tax credit because the tax upon which it is applied analytically is a franchise tax or a privilege tax. It remains a tax in lieu of income taxes; why should it have different legal consequences?

Defendant argues that this tax credit is valid, that California may discriminatorily tax an out-of-state corporation as a condition for the privilege of doing business in California. The more recent decisions of the United States Supreme Court do not support this contention. For background material see the illuminating discussion of *Unconstitutional Conditions* in 73 Harvard L.R. 1595 (1960) at 1605-1609.

Quite recently the unanimous opinion of the United States Supreme Court in *Complete Auto Transit, Inc.* v. *Brady* (1977) 51 L.ed. 2d 326 at 337 held that "There is no economic consequence that follows necessarily from the use of the particular words, 'privilege of doing business,' and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect." Ignoring the form in which the principal office deduction is cast and focusing attention on whether it produces a "forbidden effect," we find such an effect – discrimination against interstate commerce because it is interstate commerce.

Thirty years ago in *Freeman* v. *Hewit* (1946) 329 U.S. 249 at 252 the United States Supreme Court said, with

reference to the many opinions that are pertinent to this subject, "To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future." This court is encouraged by the readiness with which the United States Supreme Court has recently overturned some of the historically unsound and illogical precedents in the field of state taxation. Just this year *Spector Motor Service* v. *O'Connor* (1951) 340 U.S. 602 was specifically and unanimously overruled by *Complete Auto Transit, Inc.* v. *Brady, supra.* Just last year, in *Michelin* v. *Wages* (1976) 423 U.S. 276 the court unanimously overruled *Low* v. *Austin* (1872) 80 U.S. (13 Wall.) 29. Thus encouraged, and with the original purposes of the due process, equal protection and commerce clauses in mind, and following the more recent reasoning and analysis of these matters by our highest court, this court concludes that the denial by defendant to plaintiff of the principal office deduction is an unconstitutional discrimination, that the California constitutional provision and statute mandating such denial violates the United States Constitution and that, therefore, plaintiff is entitled to that credit for all tax years pertinent herein.

DATED: August 4, 1977.

/s/ A. R. EARLY
JUDGE OF THE
SUPERIOR COURT

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY, a corporation,

Plaintiff,

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,

Defendant.

No. C 3189

Appendix A

CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on June 10, 1977, in Department 15 of the above entitled court, the Honorable Alexander R. Early, Judge presiding, plaintiff The Western and Southern Life Insurance Company appearing by Messrs. Kyte, Conlan, Wulsin & Vogeler by Alan R. Vogeler, Esq. and by Messrs. Paul, Hastings, Janofsky & Walker by Ronald M. Oster, Esq., and defendant State Board of Equalization of the State of California appearing by Evelle J. Younger, Attorney General of California, by Timothy G. Laddish, Esq., and the parties having agreed to a Stipulation of Facts, and trial briefs having been filed by the parties' respective counsel, and the cause having been argued and submitted for decision, the court, having adopted the parties Stipulation of Facts as its written Findings of Fact, does hereby make in writing its Conclusions of Law, as follows:

1. The carrying on within a state of an insurance business by a corporation incorporated in another state constitutes interstate commerce.

2. The authority to regulate and tax the insurance industry given to the states by the McCarran-Ferguson Insurance Regulation Act, 59 Stat. 33, 15 U.S.C. §§ 1011-15, could not and did not eliminate the restraints on state action in the Constitution of the United States.

3. While a state may tax interstate commerce so that it carries its fair share of the costs of state government in return for the benefits and services it derives from the state, no state may impose a tax which discriminates against interstate commerce by providing a direct commercial advantage to local business.

4. Prior to November 3, 1964 California authorized tax retaliation against insurers from another state only when the tax laws of that state discriminated against California insurers in favor of its domestic insurers, thus giving the latter a competitive advantage over California insurers within its borders. This type of law can appropriately be called an "anti-discrimination retaliatory tax."

5. The amendment of Article XIII, Section 14-4/5 (f) (3) of the California Constitution on November 3, 1964 purported to authorize and Insurance Code Section 685 imposed tax retaliation against insurers from another state in the years here involved when the laws of that state levied higher taxes upon California insurers doing business in that state than California imposed upon insurance companies from that state doing business in California, irrespective of whether the other state discriminated against California companies or taxed them exactly the same as it did its domestic companies. This type of law appropriately has been called a "comparative retaliatory tax".

6. The objective of California retaliatory taxes is to discourage other states from imposing discriminatory taxes on California insurers. That objective is effectively served by an "antidiscrimination retaliatory tax" and is not served at all by the "comparative retaliatory tax".

7. In none of the years here pertinent did the State of Ohio discriminate against California insurance companies doing business in Ohio, imposing the same burdens and taxes on its domestic insurers that it imposed on California insurance companies doing business in Ohio.

8. Section 685 of the California Insurance Code and Article XIII Section 14-4/5 (f) (3) of the California Con-

stitution impose a comparative retaliatory tax which neither prevents discrimination by other states nor insures even-handed treatment by those states of California insurers.

9. The California retaliatory tax as effective for the years 1965 and following discriminates against insurers from other states, including Ohio, thereby providing a direct commercial advantage to local business and discriminated against interstate commerce, and, therefore, violates both the due process and commerce clauses of the United States Constitution.

10. The denial to a foreign insurer of a credit against the California premiums tax for real property taxes paid in California on the principal office in California of such foreign insurer under the 1966 amendment to Article XIII Section 14-4/5 (e) of the California Constitution and the 1967 amendment to Revenue and Taxation Code Section 12241 grants a property tax exemption to domestic insurers while denying it to an out-of-state insurer. This change in the law was not intended to be retro-active and is inapplicable to 1966 taxes.

11. The gross premiums tax imposed by Article XIII, Section 14-4/5 of the California Constitution on insurers doing business in the State of California is in lieu of all other taxes except real estate taxes.

12. Article XIII, Section 14-4/5 (e) of the California Constitution, together with Section 12241 of the California Revenue and Taxation Code purported to grant a credit against the gross premiums tax to local insurers for real estate taxes paid to the State of California while denying such a credit to out-of-state insurers.

13. Granting such a credit to local insurers while

denying such a credit to out-of-state insurers discriminates against interstate commerce by creating a direct commercial advantage to local business.

14. Just as a discriminatory credit for taxes paid constitutionally would fail as applied to an income tax or a gross receipts tax, so also it is unconstitutional as applied to property taxation.

15. Irrespective of whether the gross premiums tax may be characterized as a franchise or privilege tax, it remains a tax in lieu of income taxes and discrimination in such a tax has the same legal consequences as discrimination in an income tax.

16. Discrimination in granting a credit for real estate taxes against the gross premiums tax is prohibited by the due process and equal protection clauses of the Fourteenth Amendment to, and by the commerce clause of Article I, Section 8, Clause 3, of the United States Constitution.

17. The gross premiums tax imposed by Article XIII, Section 14-4/5 of the California Constitution and the retaliatory tax imposed by Article XIII, Section 14-4/5 (f) (3) and Section 685 of the California Insurance Code are mutually interdependent, and to the extent that a credit against the gross premiums tax is allowed, the retaliatory tax is correspondingly increased.

18. Sections 12432 and 12290 of the California Revenue and Taxation Code do not bar the collection of additional retaliatory taxes not assessed by the state within the period set forth therein when an out-of-state insurer successfully contests the assessment of a portion of the gross premiums tax and secures a reduction in such assessment.

19. Plaintiff is barred from claiming that it should

be treated as a California insurer because it failed to raise this issue in its claim for refund.

20. Plaintiff is entitled to judgment for the full amount of tax refunds sought, plus interest as provided by statute.

DATED: .....

.....

Judge of the Superior Court

Approved as to form and conformity
with Memorandum of Intended Decision
and Minute Order, filed August 4, 1977.

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SUPERIOR COURT OF THE STATE OF
CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

Filed October 27, 1977

THE WESTERN AND SOUTHERN LIFE
INSURANCE COMPANY, a corporation,
Plaintiff,

v.

STATE BOARD OF EQUALIZATION OF
THE STATE OF CALIFORNIA,
Defendant.

No. C 3189

JUDGMENT

IT IS ORDERED ADJUDGED AND DECREED that plaintiff The Western and Southern Life Insurance Company have judgment against defendant State Board of Equalization of the State of California in the sum of $977,853.57, together with costs, and interest (at the rate of 6 percent per annum through December 31, 1975, and at the rate of 12 percent per annum thereafter) computed pursuant to section 13107 of the Revenue and Taxation Code on the following amounts from the following dates: on $128,214.90 from November 25, 1966; on $78,042.57 from July 14, 1967; on $52,517.91 from November 24, 1967; on $3,072.38 from March 15, 1968; on $72,900.38 from June 10, 1968; on $60,270.01 from November 29, 1968; on $81,917.80 from October 13, 1969; on $65,390.47 from November 21, 1969; on $81,576.55 from March 26, 1970; on $66,265.56 from November 30, 1970; on $76,-446.55 from March 29, 1971; on $67,639.12 from November 23, 1971; on $78,164.41 from March 27, 1972; and on $65,434.96 from November 27, 1972.

DATED: 27 October 1977

/s/ A. R. EARLY
Judge of the Superior Court

Approved as to form and conformity
with Memorandum of Intended Decision
and Minute Order, filed August 4, 1977.

PAUL, HASTINGS, JANOFSKY & WALKER
By: /s/ RONALD M. OSTER
Attorneys for Plaintiff

EVELLE J. YOUNGER
By: /s/ TIMOTHY G. LADDISH
Attorneys for Defendant

Appendix A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

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2 Civ. No. 55251
(Super Ct. No. C-3189)

THE WESTERN AND SOUTHERN
LIFE INSURANCE COMPANY,

Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA,

Defendant and Appellant.

(Filed November 2, 1979)

APPEAL from a judgment of the Superior Court, Los Angeles County. Alexander R. Early III, Judge. Reversed.

George Deukmejian, Attorney General, Ernest P. Goodman, Assistant Attorney General, and Timothy G. Laddish, Deputy Attorney General, for Defendant and Appellant.

Frost & Jacobs, Alan R. Vogeler, Gerald L. Baldwin, Paul, Hastings, Janofsky & Walker, and Ronald M. Oster for Plaintiff and Respondent.

This case involves the constitutionality of two provisions of California law imposing taxes on foreign insurance companies. The trial court found in favor of the plaintiff insurance company, holding that one of those provisions (the so-called retaliatory tax) was unconstitutional. It also made findings on other issues as set forth in its memorandum of intended decision as follows:

"In the above-entitled matter now submitted, judgment is for plaintiff for the full amount of tax refunds sought in accordance with the enclosed Memorandum Decision plus interest.

"To dispose of all issues and avoid a possible retrial following appeal the court further finds as follows:

"A. Plaintiff is barred from claiming that it should be treated herein as a California insurer because it failed to so claim in its claim for refund. R. & T. Code Section 13103. Cf. *American Chemical Corp.* v. *County of Los Angeles* (1974) 42 C.A.3d 45 at 55-56, hearing denied, cert. den. 422 U.S. 1007.

"B. To the extent that plaintiff's principal office deduction is allowed to plaintiff, its retaliatory tax will be correspondingly increased. The premium tax and the retailatory [sic] tax are mutually interdependent.

"C. The 1966 Amendment to California Constitution, Article XIII, Section 14-4/5 (e) and R. & T. Code Sec. 12441 were not intended by the law-makers to be retroactive and can not be applied to 1966 taxes. Cf *Western & Southern Life Ins. Co.* v. *State Board of Equalization* (1970) 4 C.A.3d 21, hearing denied, at 34-35.

"The stipulation of facts on file herein is adopted as the court's findings of fact. Plaintiff is ordered to pre-

pare appropriate conclusions of law and judgment, submit them to defendant for approval as to form and accuracy and then to the court for signature."

The case was submitted on a stipulation of facts. They may be summarized as follows:

Plaintiff is an Ohio corporation, licensed in 1956 to do business in California. While its principal office is in Ohio it owns a building in Los Angeles which it utilizes as its principal office for California. Approximately 76% of that building is leased by it to tenants not connected with the operations of plaintiff. The taxes imposed by Ohio, on a California corporation doing business in Ohio, exceed the taxes imposed on foreign corporations doing business in California, under the basic premium tax imposed by California. The "retaliatory tax" herein involved imposes on plaintiff (and similar insurers) an additional tax equal to that difference. It is the validity of that additional tax that is the principal issue in this case.

Prior to 1966, California allowed an insurance company to deduct from its premium tax, the amount of local property tax imposed on its principal office in this state; by an amendment in that year, the real property tax deduction was amended so that foreign insurers,[1] but not domestic insurers, were limited to a deduction equal only to the proportion of such taxes attributable to the portion of the home office building used by the insurer. The effect, therefore, was to impose on a foreign insurer a larger premium tax than that imposed on domestic insurers.

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[1] As used herein, and in the literature on the subject, a "foreign" insurance company is one incorporated and having its principal office in a state other than the state imposing the taxes; a "domestic" insurance company is one incorporated in, and having its principal office, in the state imposing the taxes.

Appendix A

I

Retaliatory taxes, in some form, exist in at least 49 states. The purpose, as set forth in many cases and in the literature discussing them, is to put pressure on the several states to impose the same tax burden on all insurance companies, foreign or domestic, and thereby encourage the doing of interstate business.

Prior to 1964, the California Constitution provided for a retailatory [sic] tax involving two elements: a tax on *discriminatory* taxes, i.e., taxation of a California insurer doing business in the home state of a foreign insurer, at a higher rate than that state imposed on its own insurers; and (2) a tax on *comparative* taxes such as the one herein involved. At that time, the statutory law imposed a retailatory [sic] tax only on the comparative theory. In 1964, the California Constitution was amended to delete the provision relating to discriminatory taxes and thereafter both the California Constitution and the statute used parallel language imposing only the comparative tax.

In cases involving the applicability of the pre-1964 tax scheme, the courts held that, because the California Constitution required that a tax imposed by the home state of a foreign insurer involve both the discriminatory and the comparative feature, the statutory attempt to impose a retaliatory tax in situations involving only the comparative tax was invalid as being beyond the California constitutionally granted power of taxation.[2] We agree with plaintiff that the *holding* of those cases was limited to that issue, although there is language, relied on here by de-

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[2] *Franklin Life Ins. Co.* v. *State Bd. of Equalization* (1965) 63 Cal. 2d 222; *Atlantic Ins. Co.* v. *State Bd. of Equalization* (1967) 255 Cal. App.2d 1.

fendant, that can be read as sustaining the constitutionality of the present comparative provisions. We turn then, to consider the issue herein involved with no binding California precedent, although the language relied on by defendant is, of course, entitled to our respect.

For many years, under the compulsion of *Paul* v. *Virginia* (1868) 75 U.S. (8 Wall.) 168, which had held that the business of insurance was not "commerce" within the meaning of the Commerce Clause of the federal Constitution, the states had imposed a variety of retaliatory taxes. In 1944, in *United States* v. *South-Eastern Underwriters Assn.* (1944) 322 U.S. 533, the Supreme Court overruled *Paul* v. *Virginia* and held that the business of insurance was within the commerce clause. Shortly thereafter, Congress enacted the so-called McCarran Act (59 Stats. 33, 15 U.S.C. §§ 1011-1015). That statute provided that "the business of insurance . . . shall be subject to the law of the several States which relate to the regulation or taxation of such business." In *Prudential Ins. Co.* v. *Benjamin* (1946) 328 U.S. 408, the Supreme Court construed that statute and concluded that Congress had "clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it. . . ." (328 U.S. at 431.) We conclude that that decision, and other cases following it,[3] compel us to reject plaintiff's contention that the statutes herein involved are unconstitutional as affecting interstate commerce.

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[3] See, for example: *Prudential Ins. Co.* v. *Hobbs* (1946) 328 U.S. 822.

II

However, *Benjamin* also made it clear that the McCarran Act did not insulate state legislation from attack on grounds other than the commerce clause. In that connection, the Supreme Court said (at p. 430) :

"Nor is it necessary to conclude that Congress, by enacting the McCarran Act, sought to validate every existing state regulation or tax. For in all that mass of [state] legislation must have lain some provisions which may have been subject to serious question on the score of other constitutional limitations in addition to commerce clause objections arising in the dormancy of Congress' power. And we agree . . . that there can be no inference that Congress intended to circumvent constitutional limitations on its own power."

Thus we turn to plaintiff's alternative contention, i.e., that the retaliatory taxes violate the due process and equal protection clauses of the Fourteenth Amendment.[4]

We note first that, after the cautionary statement above quoted, the Supreme Court turned to consideration of the contentions that the retaliatory tax there before it did violate some other constitutional restriction. It said (at pp. 437-438) :

"These arguments may be summarily disposed of. As for the due process contention, it was settled by a long line of authorities prior to the *South-Eastern* decision, that the . . . provision of the Fourteenth Amendment, as well

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[4] Although the contention is stated as involving both provisions, the discussions in the briefs are limited to the equal protection contention. We discuss the problem in that light.

as that requiring equal protection of the laws, does not forbid the states to lay and collect such a [retaliatory] tax. . . ."

The equal protection contention has been fully considered and rejected by a previous decision in this state in *Atlantic Ins. Co.* v. *State Bd. of Equalization* (1967) 255 Cal.App.2d 1. Although that case involved the pre-1964 changes in the California Constitution, the decision dealt with both of the requirements of the provision as it then stood. After deciding that the Texas laws therein involved did discriminate against California insurers, the court discussed the issue of equal protection as related to the (second) comparative requirement. Relying in part on *Franklin Life Ins. Co.* v. *State Bd. of Equalization* (1965) 63 Cal.2d 222, it was held that the comparative retaliatory tax did not violate the equal protection clause. Whether or not the court in *Atlantic* properly relied on *Franklin,* the decision was a square holding as to the equal protection issue, and not dictum, since, as we have said above, the pre-1964 California law required that *both* elements of the then constitutional provision be met before a retaliatory tax could be assessed. The Supreme Court denied hearing in *Atlantic.* Right or wrong, we feel impelled to follow it in the case before us. It follows that, like the commerce clause contention, the equal protection contention must also fail.

III

The second major issue raised by this appeal relates to the calculation of the head office tax deduction.[5] That

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[5]The entire home office deduction was repealed in 1976.

issue has, so far as we can discover, never been litigated in any earlier California case.

The Board argues that the effect of increasing the home office exemption to plaintiff would merely increase, pro tanto, the retaliatory tax payable for that year. Since the amount of the retaliatory tax is the difference between the premium tax paid to California and the comparable tax payable in plaintiff's home state, that contention is correct. It follows that, even if plaintiff is correct in its attack on the constitutionality of the home office exemption, the amount that it paid was correct. Plaintiff's argument here seeks to avoid that result by treating the gross premium tax and the retaliatory tax as separate and arguing that, if it has overpaid the former and underpaid the latter, it is entitled to a refund on its timely claim for overpaid premium tax and the state is barred by section 12342 of the Revenue and Taxation Code from making a late assessment for underpaid retaliatory tax. This theory misses the reality of the California tax on insurers. The two provisions are but parts of a single taxation scheme. Unless plaintiff has, in the end, paid no more than the scheme required, it is not entitled to any refund.

The judgment is reversed.

CERTIFIED FOR PUBLICATION.

KINGSLEY, J.

We concur:

FILES, P.J.
ALARCON, J.

Appendix A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

---

2 Civ. No. 55251
(Super Ct. No. C-3189)

THE WESTERN AND SOUTHERN
LIFE INSURANCE COMPANY,
Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA,
Defendant and Appellant.

**ORDER MODIFYING OPINION AND
DENYING REHEARING**
(Filed November 28, 1979)

THE COURT:*

(1) The opinion heretofore filed in the above entitled case on November 3, 1979, is hereby modified as follows:

(a) In line 10 on page 10 of the Xerox opinion, [line 20, page 32a, herein] delete the word "retaliatory."

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* FILES, P. J.; KINGSLEY, J.

(b) In footnote 3 on page 9 of the Xerox opinion [page 31a, herein] add the following: The tax involved in *Hobbs* has been held to be "substantially identical to Insurance Code section 685." (*Atlantic Ins. Co.* v. *State Board of Equalization* (1967) 255 Cal.App.2d 1, 10.)

(c) In line 13 on page 13 of the Xerox opinion, [line 21, page 34a herein] delete the word "no."

(2) The petition for rehearing is denied.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
San Francisco, California 94102

Dec. 27, 1979

I have this day filed Order

HEARING DENIED

In re: 2 Civ. No. 55251
Western and Southern Life Ins. Co.

vs.

State Board of Equalization

Respectfully,

G. E. BISHEL
Clerk

APPENDIX B

IN THE COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

2nd Civil No. 55251

THE WESTERN AND SOUTHERN LIFE INSURANCE COMPANY,
Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Defendant and Appellant,

(Filed February 11, 1980)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that The Western and Southern Life Insurance Company, Plaintiff and Respondent above named, hereby appeals to the Supreme Court of the United States from the judgment of the Court of Appeal, Second Appellate District, State of California, filed November 2, 1979, as modified November 28, 1979, petition for hearing of which was filed December 11, 1979 with and denied December 27, 1979 by the Supreme Court of California. The judgment appealed from reversed the decision of the

Los Angeles Superior Court, Civil No. C 3189, holding that Plaintiff was entitled to refund of California taxes for the years 1966 through 1971 paid by it under protest.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2).

/s/ ALAN R. VOGELER
FROST & JACOBS
2500 Central Trust Center
201 E. Fifth Street
Cincinnati, OH 45202
Attorneys for Plaintiff and
Respondent

CERTIFICATE OF SERVICE

STATE OF OHIO, COUNTY OF HAMILTON: SS:

I, the undersigned, Alan R. Vogeler, am a member of the bar of the Supreme Court of the United States and am counsel for The Western and Southern Life Insurance Company, Plaintiff and Respondent below, in behalf of whom service of this Notice is being effected.

On February 5, 1980, I served the foregoing document described as Notice of Appeal to the Supreme Court of the United States on all parties required to be served in this action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Cincinnati, Ohio, addressed as follows:

SEE ATTACHED LIST.

/s/ ALAN R. VOGELER

George Deukmejian, Esq.
Ernest P. Goodman, Esq.
Timothy G. Laddish, Esq.
6000 State Building
San Francisco, CA 94102

The Honorable Alexander R. Early, III
Superior Court of the State of California
For the County of Los Angeles
111 North Hill Street
Los Angeles, CA 90012

Court of Appeal, State of California
Second Appellate District
Division Four
3580 Wilshire Boulevard, Room 301
Los Angeles, CA 90010

Supreme Court, State of California
4250 State Building
San Francisco, CA 94102

Appendix B

[UNDER LETTERHEAD, OFFICE OF THE CLERK
SUPREME COURT OF CALIFORNIA]

February 8, 1980

Alan R. Vogeler, Esq.
Frost & Jacobs
2500 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202

Re: 2 Civ. 55251 — Western and Southern Life Insurance Company v. State Board of Equalization

Dear Mr. Vogeler:

The Notice of Appeal is returned for the reason that it appears you have properly filed same in the Court of Appeal, the court possessed with the record.

Very truly yours,

/s/ J. L. KAVANAGH
Chief Deputy

JLK:ms
Enclosure
cc: Attorney General

APPENDIX C

California Constitution, § 14-4/5(e):

Each insurer shall have the right to deduct from the annual tax imposed by this section upon such insurer in respect to a particular year the amount of real estate taxes paid by it, in that year, before, or within 30 days after, becoming delinquent, on real property owned by it at the time of payment, and in which was located, in that year, its home office or principal office in this State. Such real property may consist of one building or of two or more adjacent buildings in which such an office is located, the land on which they stand, and so much of the adjacent land as may be required for the convenient use and occupation thereof.

Where as a result of merger, consolidation, or other method of acquisition of substantially all of the assets of one or more insurers by another insurer, effected prior to January 1, 1939, an insurer owns more than one parcel of real property in this State in which was located a home office or principal office of an insurer immediately prior to such acquisition, the owner shall designate one of such properties as its home or principal office. Real estate taxes paid by it in any of the years 1943 to 1952, inclusive, before, or within 30 days after, becoming delinquent, on such property owned by it at the time of payment and not so designated may also be deducted from the annual tax imposed by this section in respect to such year and are included within the deduction provided for in this subdivision.

California Constitution, § 14-4/5(f):

The tax imposed on insurers by this section is in lieu of

all other taxes and licenses, state, county, and municipal, upon such insurers and their property, except:

(1) Taxes upon their real estate.

(2) That an insurer transacting title insurance in this State which has a trust department or does a trust business under the banking laws of this State is subject to taxation with respect to such trust department or trust business to the same extent and in the same manner as trust companies and the trust departments of banks doing business in this State.

(3) When by the laws of any other state or country any taxes, fines, penalties, licenses, fees, deposits of money or securities or other obligations or prohibitions are imposed on insurers of this State doing business in such other state or country, or upon their agents therein, in excess of those imposed upon insurers of such other state or country or upon their agents therein, so long as such laws continue in force, the same obligations and prohibitions of whatsoever kind may be imposed by the Legislature upon insurers of such other state or country doing business in this State, or upon their agents herein.

(4) The tax on ocean marine insurance.

(5) Motor vehicle and other vehicle registration license fees and any other tax or license fee imposed by the State upon vehicles, motor vehicles or the operation thereof.

California Insurance Code, § 685:

Imposition of retaliatory taxes, licenses, fees, fines, penalties or deposit requirements.

When by or pursuant to the laws of any other state or foreign country any taxes, licenses and other fees, in the aggregate, and any fines, penalties, deposit requirements or

other material obligations, prohibitions or restrictions are or would be imposed upon California insurers, or upon the agents or representatives of such insurers, which are in excess of such taxes, licenses and other fees, in the aggregate, or which are in excess of the fines, penalties, deposit requirements or other obligations, prohibitions, or restrictions directly imposed upon similar insurers, or upon the agents or representatives of such insurers, of such other state or country under the statutes of this State, so long as such laws of such other state or country continue in force or are so applied, the same taxes, licenses and other fees, in the aggregate, or fines, penalties or deposit requirements or other material obligations, prohibitions, or restrictions, of whatever kind shall be imposed upon the insurers, or upon the agents or representatives of such insurers, of such other state or country doing business or seeking to do business in California. Any tax, license or other fee or other obligation imposed by any city, county, or other political subdivision or agency of such other state or country on California insurers or their agents or representatives shall be deemed to be imposed by such state or country within the meaning of this article. (Added by Stats. 1959, c. 2120, p. 4945, § 1.)

California Revenue and Taxation Code, § 12241:

Real estate taxes on principal office realty

(a) Each insurer shall have the right to deduct from the tax imposed by this chapter upon an insurer in respect to a particular year the amount of real estate taxes paid by it, in that year, before, or within 30 days after, becoming delinquent, on real property owned by it at the time of payment, and in which was located, in that year, its home

office or principal office in this state. Such real property may consist of one building or of two or more adjacent buildings in which such an office is located, the land on which they stand, and so much of the adjacent land as may be required for the convenient use and occupation thereof.

(b) In the event a portion of the real property described in subdivision (a) is occupied by a person or persons other than the insurer the deduction granted the insurer by said subdivision shall be limited to that percentage not to exceed 100 percent, equal to the sum of (i) the percentage of occupancy of the insurer obtained by deducting from 100 percent the ratio that the square footage of said building or buildings occupied by the person or persons other than the insurer bears to the total square footage of said building or buildings plus (ii) the lesser of one-half of said percent of occupancy of the insurer or 25 percent, provided, however, that the limitation set forth in this paragraph shall not be applicable to such real property occupied by a domestic insurer as its home office or principal office in this state on January 1, 1970, or to such real property upon which construction of the home office or principal office of the domestic insurer commenced prior to January 1, 1970. As used in this section, "domestic insurer" means an insurer organized under the laws of this state and licensed to transact insurance in this state on or before December 31, 1966.

(c) The phrase "person or persons other than the insurer" as used in subdivision (b) of this section shall not include (i) another insurance company or association affiliated directly or indirectly with the insurer through direct ownership or common ownership or control; or (ii) the

corporate or other manager of the insurer to the extent of its insurance management activities.

(Added by Stats, 1961, c. 740, p. 1983, § 28, operative Jan. 1, 1962. Amended by Stats, 1967, c. 1007, p. 2600, § 4.)

California Revenue and Taxation Code, § 12284:

Assessment; notice.

Annually, on or before September 15th, the board shall assess in respect to the preceding calendar year, the retaliatory taxes imposed upon insurers, giving consideration to the recommendations of the Insurance Commissioner. Immediately after making the assessment of retaliatory tax against an insurer, the board shall give notice of the assessment to the insurer at its address as it appears in the records of the board. The board shall transmit copies of the notice to the Insurance Commissioner and the Controller.

(Added by Stats. 1961, c. 44, p. 985, § 1, eff. March 31, 1961.)

California Revenue and Taxation Code, § 13102:

Necessity of claim for refund or credit.

No suit or proceeding shall be maintained in any court for the recovery of any amount alleged to have been erroneously or illegally assessed or collected unless a claim for refund or credit has been duly filed in accordance with Article 2 of Chapter 7 of this part.[1]

(Added by Stats. 1961, c. 740, p. 1992, § 70, operative Jan. 1, 1962.)

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[1] Section 12977 et seq.

Appendix C

California Revenue and Taxation Code, § 13103:

Action against board after notice of board's action on claim for refund or credit.

Within 90 days after the mailing of the notice of the board's action upon a claim for refund or credit, the claimant may bring an action against the board on the grounds set forth in the claim in a court of competent jurisdiction in any county or city and county in the State in which the Attorney General has an office for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed. The Attorney General shall defend the action.

(Added by Stats. 1961, c. 740, p. 1992, § 72, operative Jan. 1, 1962.)